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FILED
JAN 10 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 744

ERNEST A. MISHNE,

and

GEORGE MISHNE,

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Geauga County, Ohio,
Seventh Judicial District of Ohio.

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OPINIONS BY COURTS BELOW.

Petitioners, Ernest A. Mishne and George Mishne, respectfully pray that a writ of certiorari issue to the Court of Appeals for Geauga County, Ohio, Seventh Judicial District of Ohio to review the judgment and decision of that Court in Cases Nos. 355 and 356 entitled *The State of Ohio vs. Ernest A. Mishne* and *The State of Ohio vs. George Mishne*, respectively. The decision of the Court of Appeals dated March 2, 1963, is unreported and is appended hereto as Appendix A. The judgment journal entry of the Court of Appeals dated March 26, 1963 and the entry dated April 13, 1963 overruling petitioners' motion to certify the record to the Supreme Court of Ohio are appended hereto as Appendix B. The judgment of the Court of Appeals affirmed judgments of the Court of Common Pleas

of Geauga County upon the verdict of the jury finding petitioners guilty of the crimes of assault with intent to maim and assault and battery upon one Robert Gregory. The indictment is appended hereto as Appendix C. Petitioner Ernest A. Mishne was found guilty of counts one, two, four, five and ten, but not guilty of counts three, six, seven, eight or nine, but in each of said counts guilty of the lesser offense of assault and battery. Petitioner George Mishne was found guilty of counts one, two, four, five, seven, eight and ten, but not guilty of counts three, six or nine, but only of the lesser offense of assault and battery. Petitioners filed motions for a new trial which were overruled on June 14, 1962. The journal entries of the Court overruling the motions for a new trial are appended hereto and included in Appendix D. Thereafter on June 23, 1962, the Court of Common Pleas entered its judgment on each of the defendants. A copy of the journal entry of judgment in each case is appended hereto and included in Appendix D.

After the judgment of the Court of Appeals affirming the decision of the Court of Common Pleas, petitioners seasonably sought review of the judgments of the Court of Appeals by the Supreme Court of Ohio raising, among other things, questions as to whether petitioners' right to a fair trial under the Constitution of the United States of America and of the State of Ohio had been violated. The jurisdiction of the Supreme Court of Ohio to review these cases is found under Article IV, Section 2, Constitution of the State of Ohio and Sections 2505.28 and 2505.29 of the Ohio Revised Code. Under these provisions, petitioners had no appeal as a matter of right to the Ohio Supreme Court. Review by that Court is discretionary upon the grounds that a debatable constitutional question is involved or that the case is one of public or great general

interest. Petitioners filed appeals as a matter of right on the basis of the constitutional questions involved and also filed motions for leave to appeal on the basis of the issues being of public or great general interest. On September 25, 1963, the Supreme Court of Ohio dismissed the appeals as of right on the basis that no debatable constitutional question existed in the cases and overruled the motions for leave to appeal. Appended hereto in Appendix E are the journal entries of the Supreme Court of Ohio setting forth these orders. Petitioners thereupon filed a motion for rehearing which on October 23, 1963, was denied by the Supreme Court. A copy of the order of the Supreme Court denying this motion is appended hereto in Appendix E.

Under the law of Ohio, therefore, the judgment of the Court of Appeals for Geauga County, Ohio, Seventh Judicial District of Ohio, becomes the final judgment of the highest Court of the State of Ohio in which a decision can be had. *Cuyahoga River Power Co. v. The Northern Realty Co.*, 244 U. S. 300 (1917).

JURISDICTION OF THIS COURT.

Jurisdiction of this Court to review the said judgments of the Court of Appeals for Geauga County and to review the constitutional questions raised by petitioners are conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. Were petitioners' constitutional rights to due process and equal protection of the law denied by reason of the Trial Court's refusal to order the court reporter in attendance to record the final argument of the prosecutor?

2. Is the right to a fair trial vitiated when the prosecutor in final argument makes allegations of fact which were not supported by the evidence and which concern important issues in the case?

3. Were petitioners denied a fair and impartial trial by reason of certain comments of the Trial Court tending to indicate to the jury that he favored the prosecution and believed the complaining witness?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States. The statute involved is Section 2301.20 of the Ohio Revised Code which guarantees to all litigants in the State of Ohio the right to a transcript of the proceedings. The foregoing constitutional provision and state statute are appended hereto as Appendix F.

STATEMENT OF THE CASE.

Petitioners were convicted of assault with intent to maim and wound a former employee of theirs, Robert Gregory. Petitioner George Mishne was also convicted of stabbing Gregory with intent to maim and wound.

Petitioners operate a vending machine company in the Village of Chardon, Ohio, selling through their vending machines located in various public places in the County of Geauga, products such as candy, popcorn, cigarettes

and soft drinks. Gregory, who had left Geauga County for nearby Warren, Ohio, had cashed a bad check at a gas station in Chardon owned by Fred Pierson. Pierson brought charges against Gregory and he was arrested and returned to Geauga County and imprisoned by the Sheriff in Chardon. George Mishne, in the middle of the morning, bailed Gregory out of jail and returned with him to his place of business where Gregory alleged George and Ernest Mishne beat him 150 times over the head and body with a wrecking bar and a club. The prosecution theorized that George Mishne induced Pierson to bring the charge against Gregory so as to make Gregory available to petitioners who were angry at him for taking customers away from them. There is no evidence in the record supporting this theory of the prosecution and the sole statement to this effect was in the prosecutor's final argument.

At the trial of the case it developed that Gregory had originally told the police that his injuries arose as a result of a hit-skip accident. Thereafter he changed his story and brought a $200,000.00 suit for personal injuries against petitioners for assaulting him. The basis of the prosecution's case rested, of course, upon the credibility of Gregory, who had an extensive criminal record and at the time of the trial was on probation for larcency by trick and non-support. (R. 522.) During the cross-examination of Gregory, the Trial Court significantly aided the prosecution in the following colloquy appearing at page 124 of the transcript:

> "Q. And before that on February 25th of 1960 you remember one driving while intoxicated?
>
> A. Yes, sir.
>
> Mr. Henry: Object to the last question, the question before the last one, the charge. A person may be charged, particularly when a traffic misdeameanor has no bearing at all on his credibility.

Court. We will take it away from the Jury unless we get a contrary answer. He has admitted these things. So, he is an honest person in that respect."

and beginning at page 128 of the transcript appears the following:

"Q. Did you ever claim you were hit by a metal pipe?

A. Not that I know of.

Court: You mean at this—

Q. September 9, 1961 did you ever claim that the injuries you received came from being hit by a metal pipe?

A. Not as I know, sir.

Q. Do you remember giving a history of what happened to you to University Hospital?

A. To whom?

Q. To anyone when you went in there, did you tell them you got hit by a metal pipe?

A. Not as I recall.

Q. You say you might have?

A. I don't think so, sir.

Q. Did you ever swear under oath to a statement saying that you got hit by a metal pipe?

Court: On September 9, 1961?

Q. Yes, did you ever swear under oath to a statement that on September 9, 1961 you were hit by a metal pipe?

A. Not as I know of, sir.

Q. Do you remember swearing to a petition #15-304 filed against George and Ernest Mishne in this court for $200,000?

A. Yes, sir.

Q. Did you say in that petition that you were hit by a metal pipe?

A. No, sir.

Mr. Hasenflue: I presume that petition, the original would be next door in the court?

Court: Perhaps in the petition the jury is due an explanation that in a petition the man adopts the lawyer's language.

Mr. Hasenflue: If the Court is making that statement on behalf of the prosecutor, the defendant objects to it.

Court: I am simply talking to counsel. Would such a thing in your judgment attack the credibility of this man?

Mr. Hasenflue: Yes.

Court: For what it is worth, you may have it then."

Ernest Mishne at the time of the alleged incident was suffering from an injury to his leg and required the use of a cane in walking.

At page 95 of the transcript the Court assisted the complaining witness during cross-examination as follows:

"Q. Did he limp?

Court: If you recall.

A. I don't recall.

Q. Did he use a cane to help him walk?

A. I don't recall."

And thereafter the Court interfered with the cross-examination of Gregory even though there was no objection as is apparent from page 105 of the transcript.

"Q. Do you think they would stand there with guns pointed at you while the policeman was there?

Court: You need not answer that question."

And then, at page 125 of the transcript appears the following comment by the Court to the prosecutor in the presence of the jury:

"Court: What does State's attorney think about it? I imagine you are standing back to make an objection to all of this testimony."

And at another point in the trial when the defense counsel had caught one witness for the prosecution in a contradiction with the testimony of the prosecution's expert laboratory technician, the Court interfered as follows at page 346 of the transcript:

"Q. At any rate, you saw the blood spot on the sliver, you just testified to that?

A. Yes, sir.

Q. And there wasn't any blood spot on the sliver, was there?

A. There was a dark area. I couldn't tell what it was.

Q. Which blood spot are you talking about?

Court: Correction, the witness is not talking about 'blood spots.'

Mr. Hofstetter: He is talking about a 'dark area.'"

The defense maintained that Gregory's original story, i.e. that he was hit by a hit skip auto, set forth the true cause of his injuries. At page 225 of the transcript a police officer testifying for the prosecution on evidence of a hit skip stated the following:

"Q. What, if any, evidence did you find?

A. I didn't find any evidence at all. There was a skid mark in front of the place."

Thereupon the witness further testified at page 226 as follows:

"Q. But you found no broken glass or apparel or blood on the pavement, the road or in the area of the road?

A. No, sir, I didn't find any dirt shook loose from under a bumper or any evidence of that type.

Q. Dirt shook loose from a bumper?

A. Underneath the fender of an automobile.

Q. Why might there be dirt shook loose from a fender?

A. Normally on a hit skip you usually find evidence of dirt shook loose from underneath the car.

Mr. Hasenflue: Objection, no foundation.

Court: Sustained.

Mr. Henry: He was looking for evidence of a hit skip.

Court: He found no evidence at all."

The Court thus in effect dismissed the skid mark as being evidence of a hit-skip accident. In these and other instances counsel for the petitioners objected strenuously to the Court's actions thereby preserving their rights on appeal. The Court of Appeals to whom this issue was presented commented as follows:

"In considering assignments three through 10 we have reviewed them individually, considered them in relation to the entire record, and have come to the conclusion that neither individually nor collectively are they of such a nature as to warrant our finding that any or all of them affirmatively prejudiced the appellants or have denied them a fair trial. It is well known that in a trial as bitterly contested as this one some chance of error will be apparent from the record. However, in these errors asserted we cannot find them prejudicial and they are, accordingly, overruled. There are instances where the trial court seemingly over-participated in his attempt to clarify the issues and prevent the proceedings from being unfairly influenced by zealous counsel. We might not have used the language the trial court did on certain occasions, but on the other hand we might not have been as deft as he was in other respects in presiding over this heated contest. However, reading the record in its entirety, we are of the opinion that the trial court acted within the bounds of his discretion in carrying out his duty to be fair to these defendants and to the State."

The other errors complained of herein going to the constitutional rights of the defendants occurred during the final argument of the prosecutor. The prosecutor commenced argument at 10:41 A. M. After the prosecutor had been speaking for approximately 20 minutes counsel for the defendants discovered that the argument was not being recorded. He protested to the Court and requested that the remainder of the argument be recorded. The Court refused to permit this. Appended hereto as Appendix G is the final argument of the prosecutor and the other incidents that occurred during final argument which were preserved in a narrative form prepared by petitioners' then counsel. It is apparent from the record that the then counsel for the petitioners strenuously objected to the Court's ruling that the court reporter should not take down the remainder of the final argument. This objection was presented to the Court of Appeals which commented upon this issue as follows:

> "Under the court's understanding of the agreement between counsel in chambers and because of the lack of showing an affirmative request on the part of appellants' counsel for the taking down verbatim of the closing argument of prosecution, we find no error up to the point appellants' counsel claimed that he first learned that the court had told the court reporter not to record the final argument.
>
> As to the balance of the prosecutor's argument, upon request having been made for the reporter by appellants' counsel, it is apparent under the plain meaning of Section 2301.20, Revised Code, that the trial court had a duty to require the remainder of this argument to be recorded by the court reporter, notwithstanding the alleged agreement. This was not done.
>
> The purpose of the statute is to provide a method by which errors may be preserved so that on appeal

a proper determination and review may be made by appellate courts to the end that the rights of appellants may be protected in the manner provided by the Constitution and laws of this State.

However, the errors complained of were presented to this court through a narrative bill of exceptions. Having used this vehicle the errors complained of were before this court for review. No substantial error is asserted in relation to the balance of the argument which followed the court's denial of appellants' counsel's request. Accordingly, although the trial court should have granted this request, we cannot say that under these circumstances appellants were affirmatively prejudiced. If the narrative bill of exceptions had not been before us we would have found this prejudicial."

During final argument, the prosecutor also made several remarks which are not borne out by the record. Thus, at page 501 of the transcript is the following:

"Then, George received the break he had been waiting for. One of his customers was a Fred Pierson and Gregory owed him a large amount of money and Gregory had given Fred Pierson a check. When Pierson gave Gregory two (2) weeks to make it good and he couldn't, George had Gregory arrested on purpose so he could bring him back to Geauga County where he could get him.

Hasenflue: Objection, Your Honor. No such evidence.

The Court: Overruled. He may draw his own inferences from the evidence."

Fred Pierson, the person who brought the charges testified on direct examination at page 462 as follows:

"Q. Do you know who did?

A. No, Mr. Mishne told me on that day or previous to that day that I should come up to the Prosecutor's office.

Q. But did you come in on your own accord?

A. Oh, yes.

Q. But who asked you to come in?

A. Well, I don't think anybody asked me to come in. I came in of my own accord, it was under my doing that the check, that the affidavit was being signed and I was told that on this date I was to be up there."

And at page 466 on cross-examination as follows:

"A. * * * Mr. Mishne never told you that you had to prosecute Gregory for him, did he?

A. No.

Q. When you said that Mr. Mishne said he would take care of it, you had asked Mr. Mishne "How do you go about acting on this bad check that he had given you?"

A. That's right.

Q. And Mr. Mishne said he would take care of it and he did arrange for you to go up to the Prosecutor?

A. Yes. I was pretty busy at the time."

Gregory stated at page 20 of the transcript that he had quit. Furthermore, there was no evidence in the trial that Gregory had taken customers away from the Mishnes. But at page 602 appears the following:

"The Prosecutor: And I think the motive for the beating of Gregory was because he had taken these stops away from him.

Mr. Hasenflue: Objection, Your Honor, there is no such evidence and I move it be stricken.

The Court: Overruled, there was evidence of this:

And the Prosecutor continued at page 606 as follows:

"When Gregory told the Chief of Police he told him of being beaten up. Gregory testified that he knew the reason he got beat up.

Mr. Hasenflue: Objection. No such testimony.

The Court: Yes, he so testified. Overruled.

The Prosecutor Continued: Gregory knew it was because he had taken stops from the Mishnes and for this he had to suffer the injuries you see in these pictures.

Mr. Hasenflue: Objection.

The Court: Overruled."

Gregory actually had testified at page 90 as follows:

"Q. Do you know the reason for the beating?

A. No, sir * * *

Q. They never once told you why you were being beaten?

A. No, sir."

The Prosecutor continued making the following remarks:

"After Gregory was fired by Mishne, he went to work for Howell Brothers and they are a competing vending concern, and he took stops away from Mr. Mishne.

Hasenflue: Objection.

The Court: Overruled."

Gregory himself testified that he had quit, not that he was fired, and there is no evidence that Howell Brothers were competitors of the Mishnes or that they obtained customers of the Mishnes through the efforts of Gregory.

After the close of final arguments, Mr. Hasenflue pointed out to the Trial Court that the defendants' constitutional rights had been violated at page 572 of the record as follows:

"Mr. Hasenflue: If it please Your Honor, it is the position of the defendants they are entitled to a fair trial and full protection of their constitutional rights as free citizens of the country and of this state. One is his right without comment by this Court which might touch on the merit of the controversy; one of

their rights is to have the Prosecutor make only fair and accurate comments on the evidence; another right I deem a constitutional right is a precise record being kept of the records in the courtroom so those proceedings can be reviewed, if necessary. I requested this so that when objections were made a record would be preserved. This right,—and I deem it a constitutional right—was denied by this Court. I will not waive this error by proceeding to make another unrecorded argument. The error you have made cannot be cured, you cannot have the Reporter record another argument now nor correct the one argument but not the other. The error could only be enlarged if I argued and that was left under the order of the Court. The discussion in chambers between the prosecutors and the Court in regard to the recording of the final arguments was not acquiesced by counsel for the defense.

The objection and request were made over an hour before the Prosecutor finished his argument and were timely. I renew my motion for a mis-trial and if the Court overrules, then let him charge the Jury, let the Jury make its decision without argument on behalf of the defense."

Fearful of waiving his clients' rights and obviously frustrated by many occurrences during the trial of this matter, counsel for the petitioners declined to give a final argument. In retrospect it appears that he erred since the Court of Appeals stated that he would not have waived his clients' rights in making closing arguments.

Counsel for petitioners at the trial of this case raised the constitutional issues at each opportunity. Under the law of Ohio, substantial constitutional rights are not waived by the failure of counsel to raise them in the lower courts. *State of Ohio v. Hensley*, 75 Ohio St. 255 (1906). In this matter, however, the constitutional issues were raised and both the Trial Court and the Court of Appeals

ruled that petitioner's constitutional rights had not been violated.

That the constitutional issues were presented to the Court of Appeals is apparent from the following statement in the opinion:

> "In their brief appellants assert that there are three questions before this court.
>
> 1. Did the defendants receive a fair trial which impartially gave to them their constitutional rights guarded so long by the courts of this land?
>
> * * * * *
>
> Our conclusion to the first question asked above must be in the affirmative."

REASONS FOR GRANTING THE WRIT.

Question No. 1.

The Court of Appeals ruled that error had occurred but that petitioners were not prejudiced by the fact that after demand had been made, the trial court did not order the reporter to record the remainder of the prosecutor's final argument. Insofar as the undersigned has been able to ascertain this issue has never been directly presented to the Supreme Court of the United States. This Court has ruled, however, that an essential element of due process and equal protection as guaranteed to every citizen of the United States of America by the Fourteenth Amendment to the Constitution is the right to have a transcript of the proceedings in a criminal trial for the purpose of presenting the issues of error to reviewing courts. *Eskridge v. Washington State Board of Prison Terms and Parole*, 357 U. S. 214 (1957). *Griffin v. United States of America*, 351 U. S. 12 (1955). In each of the foregoing cases there was involved an indigent defendant who was deprived of equal protection by reason of the fact that a defendant who had

money could order a record prepared and thus preserve his case on appeal. In the State of Ohio there is a statute, namely, Section 2301.20 of the Ohio Revised Code which makes it mandatory for the trial court to order the Court reporter to make a full report of the proceedings upon the request of either party. Petitioners made such a request but the trial court refused to order the reporter to transcribe the proceedings during the final argument. Thus it can be presumed that in every other case in Ohio the proceedings are transcribed and so in this instance petitioners were deprived of their rights to equal protection under the law.

The Court of Appeals stated in its opinion that the trial court erred in failing to order the proceedings transcribed when the demand was made by counsel for petitioners but that this error had been corrected by reason of the fact that petitioners submitted a narrative statement of the final argument by the prosecutor. The brevity of the narrative statement, however, when compared with the other parts of the records and the fact that the prosecutor continued to talk for an hour after the demand was made by counsel for the petitioners indicates that much of the prosecutor's final argument was omitted from the narrative statement. The part that was preserved indicates that the prosecutor had a tendency to enlarge upon and add to the evidence that was presented during the trial of this matter. It will never be known to what extent the prosecutor may have made additional statements prejudicial to petitioners which could not be presented to the reviewing courts.

The United States Supreme Court has held that a complete and accurate record is an essential attribute of a fair trial. *Chessman v. Teets*, 354 U. S. 156 (1957). *Chessman v. Teets*, 350 U. S. 3 (1955). This Court recently

held, according to the report in the *New York Times* of January 7, 1963, in the case of *Hardy v. United States*, Docket No. 112, that a complete transcript of the proceedings must be made available to an indigent convicted of a crime when new counsel has been appointed for him to appeal his case. It would therefore appear that the ruling of the Court of Appeals of Geauga County, Ohio, is inconsistent with previous rulings of this Court. Certainly this issue should be decided by this Court so as to guide the other courts of the country.

Question No. 2.

The prosecutor made several statements during the final argument which were not supported by the evidence. The most serious of these was the assertion that the motive for the defendants in assaulting Gregory was that he had taken certain business stops away from them. Certainly proof of motive was an essential element of this case and not having established an adequate motive through the evidence, the prosecutor submitted his unsworn testimony during the final arguments.

This Court has held that a trial in which the prosecution uses false evidence or suppresses evidence is tainted and unfair in violation of the due process clause of the Fourteenth Amendment. *Alcorta v. Texas*, 355 U. S. 28 (1957). *Mooney v. Holohan*, 294 U. S. 103 (1935). *Pyle v. Kansas*, 317 U. S. 213 (1942).

This Court has also held that a trial is tainted even though the evidence which is false or suppressed goes merely to the credibility of a witness. *Napu v. Illinois*, 360 U. S. 264 (1958).

In this matter the prosecutor during final argument painted a picture of the defendants first firing Gregory and then, angry at him for procuring their customers for

a competing firm, having him brought back to Chardon by means of a criminal charge brought by a friend of the defendants so that they could bail him out of jail and beat him. The statements were not supported by the evidence. Made in this manner in final argument, it is submitted that the statements made a more effective impression on the jurors than if false evidence to the same effect had been introduced. With false evidence the defense has an opportunity to disclose the fabrication through cross-examination or to bring in rebuttal testimony to counter the lie. The alleged competitor or the customers could have been summoned to testify that Gregory had not obtained any of the defendants' accounts. But in final argument it is too late.

The prosecutor as an elected official prominent in the community is vested with more stature before a jury than the ordinary witness. Therefore his statements were bound to impress the jury and he had a duty not to distort the evidence. The prejudice to the defendants' rights was compounded by the Court which stated that the prosecutor's remarks were supported by the evidence when in fact they were not.

In the case of *Buchalter v. New York*, 319 U. S. 427 (1943), this Court granted certiorari on a claim that substantial rights of the petitioner under the due process clause of the Fourteenth Amendment of the Constitution had been violated, one of the claims being prejudicial remarks of the prosecutor in final argument. On investigation of the record the Court found that the petitioner's claims were without merit, but it felt that it had to grant review.

In this case, the Court of Appeals in its opinion summarily dismissed the claim that petitioners had been prejudiced by the remarks of the prosecutor.

The prosecutor in this action in his eagerness to obtain a conviction has disregarded his duty to the public to convict the accused fairly. The use of false evidence in final argument is as serious as the use of false testimony or the suppression of evidence. It is, therefore, apparent that the decision of the Court of Appeals is not consistent with prior decisions of the United States Supreme Court. Furthermore, the extent to which a prosecutor may vary from the testimony in his final argument is an issue vital in every criminal case and so a statement on this matter by this Court would be of great public interest.

Question No. 3.

The obligation of the Trial Court to be impartial and to refrain from indicating even inadvertently to the jury that he believes or favors one of the litigants over the other is obvious. Several of the Federal Circuit Courts of Appeals have commented on this obligation and have ordered reversals because of the fact that the Trial Court participated unwisely in the case. *Gomila v. United States*, 146 F. 2d 372 (5th Cir. 1944); *United States v. Fry*, 304 F. 2d 296 (7th Cir. 1962); *Williams v. United States*, 93 F. 2d 658 (9th Cir. 1937); *Frantz v. United States*, 62 F. 2d 737 (6th Cir. 1933).

The Court of Appeals of Geauga County, Ohio, although it indicated that the Trial Court erred, stated that the error was not prejudicial. This finding is believed erroneous when one considers that the Trial Court stated that the complaining witness was "honest," that on several occasions it made statements which aided the prosecution's witnesses, and that on final argument it endorsed the prosecutor's mis-statements of facts. It is highly probable that the jury was influenced by the actions of the Trial Court and so it is somewhat surprising that the Court of Appeals found its actions not prejudicial.

It is submitted that the standard applied by the Court of Appeals of Geauga County is different than that adopted by the Federal Courts cited above and that the standard applied to this case is considerably less than that required by the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

The petition for writ of certiorari should be granted not only because important constitutional rights of the petitioners have been ignored but also because the conduct of the court in the trial of a criminal action is a matter of profound importance in the nation and the issues presented herein warrant a statement from the United States Supreme Court as a basis for the guidance of the country's judiciary.

CONCLUSION.

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ADRIAN B. FINK, JR.,
Attorney for Petitioners

APPENDIX A.

Opinion of the Court of Appeals.

IN THE COURT OF APPEALS

STATE OF OHIO, GEAUGA COUNTY,
SEVENTH DISTRICT.

Case No. 355.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ERNEST A. MISHNE,

Defendant-Appellant.

Case No. 356.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

GEORGE MISHNE,

Defendant-Appellant.

OPINION.

Dated: March 2, 1963.

BROWN, J., of the Fourth District sitting by assignment in the Seventh District.

This is an appeal from a judgment of the Common Pleas Court of Geauga County entered following a jury verdict against the appellants and the denial of a motion for new trial filed thereafter by the appellants.

Appellants were indicted by the Grand Jury of Geauga County on a ten count indictment. The counts were:

Count One: That George and Ernest Mishne on or about the ninth day of September, 1961, did unlawfully

and with malicious intent to maim, assault and strike Robert Gregory with dangerous instruments, thereby breaking the leg of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

Count Two: did unlawfully and with malicious intent to disfigure, assault and cut Robert Gregory with dangerous instruments, thereby cutting and slitting the nose, ear and lip of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

Count Three: did maliciously cut Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

Count Four: did maliciously cut Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code.

Count Five: did maliciously cut Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

Count Six: did maliciously stab Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

Count Seven: did maliciously stab Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code of Ohio.

Count Eight: did maliciously stab Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

Count Nine: did unlawfully assault Robert Gregory with intent to kill him, contrary to Section 2901.24 of the Revised Code of Ohio.

Count Ten: did unlawfully assault Robert Gregory with dangerous weapons or instruments or by other means

or force likely to produce death or great bodily harm to him, contrary to Section 2901.23 of the Revised Code of Ohio.

Appellants filed a motion for a Bill of Particulars which was granted. The following was filed by appellees:

"BILL OF PARTICULARS.

"The Indictment clearly indicates who is being charged on each count. It is the Indictment of the Grand Jury that one Robert Gregory, on the ninth day of September, 1961, between the hours of two a.m. and six a.m. EDST was subjected to the type of treatment indicated in each of the ten counts noted therein, with the use of a wrecking bar, a wooden club, and possible other instruments or objects as may be brought out in evidence.

"By the use of said instruments or objects so as to maim, assault, strike, cut, slit, or stab, each of the criminal acts listed as counts in the Indictment were performed by the person charged in the Indictment on the person of Robert Gregory, said acts occurring in, upon, and about the premises operated by the defendant as a warehouse building for vending machines and supplies on North Street, Chardon, Ohio, in Geauga County. Further, counsel for the State of Ohio says that the injuries received by the said Robert Gregory included injuries to the nose, ear, lips, skull, hands, arms, back, and legs, and possible other areas in such manner and with such instruments or objects as hereinbefore referred to so as to warrant an Indictment thereon on each of the several counts."

Following trial, on June 12, 1962, the jury found both defendants guilty of assault with intent to maim, not guilty of assault with intent to kill and guilty of lesser degrees of assault and battery. George Mishne was found guilty of

Counts 1, 2, 4, 5, 7, 8 and 10, but not guilty of Counts 3, 6, or 9, but only of the lesser offense of assault and battery. Ernest Mishne was found guilty of Counts 1, 2, 4, 5, and 10, but not guilty of Counts 3, 6, 7, 8 or 9, but on each of said counts guilty of lesser offense of assault and battery.

The facts of this case are substantially as follows: In 1961 appellants operated a vending machine business in Chardon, Ohio, and Robert Gregory had worked for them and quit or was fired in August 1961. Prior to having this employment he wrote a check to Hambden Gulf, a filling station, for $20.00 which was returned for insufficient funds. Fred Pierson of Hambden Gulf received the check back from the bank. After talking with George Mishne, Fred Pierson signed an affidavit in the Prosecutor's office charging Gregory with issuing a check with insufficient funds. The deposit of $15.00 to assure appearances of witnesses in the County Court of Geauga County in this case was put up by George Mishne.

Gregory was arrested in Mecca, Trumbull County, Ohio, and was handed over to the Geauga County Deputy Sheriff by the Trumbull County Deputy Sheriff at approximately 11:00 P. M., September 8, 1961, arriving at the Geauga County Jail in Chardon about midnight. At approximately 4:00 A. M. on September 9, 1961, George Mishne bailed Gregory out.

The Chardon Telephone Company's records show two calls were made on a phone listed to George Mishne in Chardon to a phone listed to Ernest Mishne in Cleveland at 2:43 A. M. and 2:46 A. M. respectively.

After bailing out Gregory, George Mishne accompanied by Ernest Mishne took Gregory down to the warehouse arriving about 4:45 A. M. There Gregory testified that George and Ernest Mishne beat and kicked Gregory

with a stick, a wrecking bar, fists and boots, bruising and cutting him about the body and breaking his leg.

The Mishnes, the only other eye witnesses to what transpired, did not testify but according to Ernest Mishne in his statement to the police, defendant's exhibit OO, Gregory left the company of the defendants and some time later stumbled in bleeding and stated that he had been hit by a car.

When the police arrived after having been called, they found Gregory wet and badly injured.

He told Chief Bohl of the Chardon Police Department, when interviewed at the hospital, that he was hit by an automobile. Shortly thereafter he changed his story and later gave a statement relating how he had been beaten by appellants.

Scientific testimony relating to articles found in the warehouse was presented. One Molnar, a laboratory technician from the Ohio Bureau of Criminal Identification, who had identified and examined Gregory's clothes, could find no evidence that Gregory had been hit by an automobile. The police found evidence of blood splattered over boxes in the warehouse as well as evidence of an effort to clean up the place.

Fourteen assignments of error are asserted by appellants. They are:

"1. Failure of the trial court to order the prosecutor to furnish the defendants a complete bill of particulars so that they could be fully advised as to the charges made against them so that they could properly prepare a defense thereto.

"2. Overruling of the Defendants' Motion to Quash the indictment as it contains repugnant counts.

"3. Improper and prejudicial evidence was given to the jury.

"4. Law was improperly discussed by the court in front of the jury.

"5. Law was improperly discussed by the prosecution in front of the jury.

"6. Prejudicial remarks were made by the court touching on the credibility of the prosecuting witnesses.

"7. Prejudicial remarks were made by the court touching on the merits of the case, the court gave aid to witnesses for the State and made erroneous rulings, all of which would likely mislead the jury into believing the court was partial to the State.

"8. The prosecutor committed misconduct in his final argument.

"9. The prosecutor committed misconduct in deliberately asking an improper question for the sole purpose of improperly influencing the jury.

"10. The court made improper and incorrect remarks during the prosecutor's final argument regarding the evidence which the court said had been submitted when in fact there was no such evidence.

"11. The court erred in refusing counsel for the defense a mistrial during the course of said trial for various errors complained of at said times which show on the face of the record.

"12. The court erred in refusing to have stenographically recorded verbatim the final argument of the prosecutor together with objections made thereto after specific requests for same were made by counsel for defense and while the official court reporter was in attendance with her stenotype machine in working order for recording the same.

"13. The verdict was against the manifest weight of the evidence.

"14. The evidence is insufficient to support a conviction beyond a reasonable doubt."

The law of Ohio is that no judgment or conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the appellant was prejudiced thereby or was prevented from having a fair trial. See Section 2945.83 of the Revised Code of Ohio.

Assignment of error one is failure of the trial court to order the prosecutor to furnish a complete bill of particulars so they would be fully advised as to the charges made against them so that they could properly prepare a defense thereto.

Our review indicates a bill of particulars was so furnished the defendants. We find the bill so furnished is within the doctrine of *State v. Petro*, 148 Ohio St. 473; 36 Ohio Opinions 152, and reasonably informs the appellants of the nature and cause of the accusation against him. (See Revised Code Section 2945.83A.)

This assignment is overruled.

Assignment of error two is overruling of defendants' motion to quash the indictment as it contains repugnant counts.

Considering the time element involved and the evidence presented, we cannot agree with appellants' contention. (See 4 *Ohio Jurisprudence* (2d), 74.)

In considering assignments three through 10 we have reviewed them individually, considered them in relation to the entire record, and have come to the conclusion that neither individually nor collectively are they of such a nature as to warrant our finding that any or all of them affirmatively prejudiced the appellants or have denied them a fair trial. It is well known that in a trial as bitterly contested as this one some chance of error will be apparent from the record. However, in these errors asserted we cannot find them prejudicial and they are, accordingly,

overruled. There are instances where the trial court seemingly over-participated in his attempt to clarify the issues and prevent the proceedings from being unfairly influenced by zealous counsel. We might not have used the language the trial court did on certain occasions, but on the other hand we might not have been as deft as he was in other respects in presiding over this heated contest. However, reading the record in its entirety, we are of the opinion that the trial court acted within the bounds of his discretion in carrying out his duty to be fair to these defendants and to the State.

Assignment eleven refers to the court's refusal to grant various motions for a mistrial. We have examined the various motions cited and find that the denial thereof was not prejudicial to appellants' substantial rights. This assignment is overruled.

Assignment twelve is that the court refused to have recorded verbatim the final argument together with objections made after specific requests for same were made by counsel for defense and while the court reporter was in attendance with her stenotype machine in working order for recording of the same.

According to appellants, their attorney rose to make an objection during final argument and learned that the court had told the court reporter not to record the final argument. This was after one-half hour of final argument had elapsed.

Apparently there had been a previous discussion of this in the court's chambers when attorneys for both sides were present, and an agreement reached not to have the official reporter take the final argument down. This was the recollection of the court and prosecutor but not of appellants' counsel.

Counsel for appellants thereafter requested a record made. In view of the court's understanding that an agreement had been reached not to record the final argument, the prosecutor proceeded to complete the argument without the same being recorded.

The appellants' counsel thereafter refused to make a closing argument.

Section 2301.20 of the Revised Code of Ohio provides:

> "Upon the trial of a case in the court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved."

Under the court's understanding of the agreement between counsel in chambers and because of the lack of showing an affirmative request on the part of appellants' counsel for the taking down verbatim of the closing argument of prosecution, we find no error up to the point appellants' counsel claimed that he first learned that the court had told the court reporter not to record the final argument.

As to the balance of the prosecutor's argument, upon request having been made for the reporter by appellants' counsel, it is apparent under the plain meaning of Section 2301.20, Revised Code, that the trial court had a duty to require the remainder of this argument to be recorded by the court reporter, notwithstanding the alleged agreement. This was not done.

The purpose of the statute is to provide a method by which errors may be preserved so that on appeal a proper determination and review may be made by appellate courts to the end that the rights of appellants may be protected in the manner provided by the Constitution and laws of this State.

However, the errors complained of were presented to this court through a narrative bill of exceptions. Having used this vehicle the errors complained of were before this court for review. No substantial error is asserted in relation to the balance of the argument which followed the court's denial of appellants' counsel's request. Accordingly, although the trial court should have granted this request, we cannot say that under these circumstances appellants were affirmatively prejudiced. If the narrative bill of exceptions had not been before us we would have found this prejudicial. The decision not to make a closing argument, made by appellants' counsel, was his own judgment. Waiver of this error would not have resulted even if he had given his argument, if the narrative bill of exceptions was not before us.

Assignments 13 and 14 are considered together in appellants' brief.

We have the benefit of the witness Gregory, the testimony of the police officers, the various exhibits, and scientific testimony of what occurred at this warehouse. We believe on our careful examination of the record that there was sufficient proof submitted to this jury warranting the verdict reached. It is granted that Gregory's background is such that his credibility was subject to all out attack. The record reveals it was so attacked with great effectiveness by counsel for appellants. His testimony together with the other proof offered by the state was given

to the jury. They could accept or reject the same as the sole judge of the credibility of the witnesses and the facts of this case. This is their function. They were entitled to attach such weight to it as they saw fit. Of course, a conflict therein existed as it does in all criminal cases. The fact of conflict is not grounds for reversal. The record reveals sufficient evidence to satisfy reasonable minds of the guilt of appellants. Those reasonable minds were those of the jury. They believed the evidence that made for that result, and consequently, without substituting ourselves for their performance of their constitutional function, we cannot find the evidence is insufficient or that the verdict is contrary to the manifest weight of the evidence. See *State of Ohio v. Shively*, 172 Ohio State, 128; *Sandoffsky v. State*, 29 Ohio App. 419; *State of Ohio v. Lett*, 106 Ohio App. 285, and 3 *Ohio Jurisprudence* (2d), 820, *et seq.*

These assignments of error are overruled.

In their brief appellants assert that there are three questions before this court.

1. Did the defendants receive a fair trial which impartially gave to them their constitutional rights guarded so long by the courts of this land?

2. Did prejudicial error occur at the trial which denied the defendants a fair and impartial trial?

3. Was the verdict against the manifest weight of the evidence?

Our conclusion to the first question asked above must be in the affirmative, and our conclusion to the second and third questions asked above must be in the negative. There is only one reasonable explanation of what transpired on the morning of September ninth as revealed in this record, and that is the conclusion the jury

reached that Robert Gregory underwent a brutal beating at the hands of these appellants. We will not disturb the verdict reached to this effect.

Judgment affirmed.

J. L. DONAHUE, P.J., Concurs.

P. W. BROWN, J., Concurs.

APPENDIX B.

Journal Entries of the Court of Appeals, Geauga County, Ohio.

(Similar entries were filed in Court of Appeals Case Nos. 355 and 356.)

March 26, 1963:

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Geauga County, and was argued by counsel, on consideration whereof the Court finds no error prejudicial to the Appellant, and, therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that the Appellee be remanded to the Common Pleas Court for execution of sentence.

To all of which Appellant, by his counsel, excepts.

The Court finds there was reasonable grounds for this appeal.

April 13, 1963:

This cause came on for hearing upon the appeal on motion with supporting brief to certify the record to the Supreme Court on the ground of conflict. Upon the record and after consideration of appellant's brief the Court finds

said motion not well taken and the same is hereby overruled. It is ordered that the appellant be remanded to the Common Pleas Court for execution of sentence.

To all of which appellant by his counsel excepts.

APPENDIX C.

The Indictment.

COUNT ONE: That George and Ernest Mishne on or about the ninth day of September, 1961, did unlawfully and with malicious intent to maim, assault and strike Robert Gregory with dangerous instruments, thereby breaking the leg of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

COUNT TWO: did unlawfully and with malicious intent to disfigure, assault and cut Robert Gregory with dangerous instruments, thereby cutting and slitting the nose, ear and lip of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

COUNT THREE: did maliciously cut Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT FOUR: did maliciously cut Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT FIVE: did maliciously cut Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT SIX: did maliciously stab Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT SEVEN: did maliciously stab Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT EIGHT: did maliciously stab Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT NINE: did unlawfully assault Robert Gregory with intent to kill him, contrary to Section 2901.24 of the Revised Code of Ohio.

COUNT TEN: did unlawfully assault Robert Gregory with dangerous weapons or instruments or by other means or force likely to produce death or great bodily harm to him, contrary to Section 2901.23 of the Revised Code of Ohio.

APPENDIX D.

Journal Entries of the Court of Common Pleas, Geauga County, Ohio.

(June 14, 1962. Cases No. 4258.)

The matter of the amended motion for new trial in the matter of the defendant, Ernest Mishne, came on for hearing at two p.m. this fourteenth day of June, 1962. Upon consideration of the amended motion for new trial with affidavits and brief attached, it is the order of the Court that the amended motion be overruled.

It is the further order of the Court that June 23, 1962, at ten-thirty a.m. be designated as the time for pronouncement of sentence in this matter, and that until said pronouncement of sentence said defendant be continued on the ten thousand dollar ($10,000.00) appearance bond heretofore established, all until further order of the Court.

(June 14, 1962. Case No. 4258.)

The matter of the amended motion for new trial in the matter of the defendant, George Mishne, came on for hearing at two p. m. this fourteenth day of June, 1962. Upon consideration of the amended motion for new trial with affidavits and brief attached, it is the order of the Court that the amended motion be overruled.

It is the further order of the Court that June 23, 1962, at ten-thirty a. m. be designated as the time for pronouncement of sentence in this matter, and that until said pronouncement of sentence said defendant be continued on the ten thousand dollar ($10,000.00) appearance bond heretofore established, all until further order of the Court.

(June 23, 1962. Case No. 4258.)

Now comes the Prosecuting Attorney on behalf of the State of Ohio, and the defendant being brought into open court accompanied by his attorney, the defendant having been convicted of violations of Section 2901.19 of the Revised Code of Ohio, Section 2901.23 of the Revised Code of Ohio, Section 2901.24 of the Revised Code of Ohio, and Section 2901.241 of the Revised Code of Ohio, and having been informed by the court of the verdict of the jury and inquired of if he had anything to say why judgment should not be pronounced against him, and the defendant showing no good and sufficient cause why judgment should not be pronounced.

It is, therefore, considered and adjudged by the court as follows: It appears to the court that the four sections of the criminal code under which the defendant was convicted involved acts which occurred and were predicated upon the same transaction and are related to the same subject matter, and the court, therefore, imposes sentence for violation of that criminal statute which carries the

highest grade or degree of punishment, said section being Section 2901.19 of the Revised Code of Ohio.

It is, therefore, the order and judgment of this Court that the defendant be imprisoned and confined in the Ohio State Reformatory for the period of not less than three nor more than thirty years, and that the defendant pay the cost of this prosecution for which execution is awarded.

However, the defendant has given notice of appeal, and it is, therefore, ordered that the execution of the sentence herein be suspended until such appeal is finally heard and determined, provided that the defendant, during the pendency of said appeal, gives a recognizance in the sum of Ten Thousand Dollars ($10,000.00) with security with the approval of the Clerk of Courts conditioned according to law. The defendant is remanded to the custody of the sheriff until such recognizance is given. Counsel for the defendant may have his exceptions.

(June 23, 1962. Case No. 4259.)

Now comes the Prosecuting Attorney on behalf of the State of Ohio, and the defendant being brought into open court accompanied by his attorney, the defendant having been convicted of violations of Section 2901.19 of the Revised Code of Ohio, Section 2901.23 of the Revised Code of Ohio, Section 2901.24 of the Revised Code of Ohio, and Section 2901.241 of the Revised Code of Ohio, and having been informed by the court of the verdict of the jury and inquired of if he had anything to say why judgment should not be pronounced against him, and the defendant showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, considered and adjudged by the court as follows: It appears to the court that the four sections of the criminal code under which the defendant was con-

victed involved acts which occurred and were predicated upon the same transaction and are related to the same subject matter, and the court, therefore, imposes sentence for violation of that criminal statute which carries the highest grade or degree of punishment, said section being Section 2901.19 of the Revised Code of Ohio.

It is, therefore, the order and judgment of this Court that the defendant be imprisoned and confined in the Ohio State Penitentiary for the period of not less than three nor more than thirty years, and that the defendant pay the cost of this prosecution for which execution is awarded.

However, the defendant has given notice of appeal, and it is, therefore, ordered that the execution of the sentence herein be suspended until such appeal is finally heard and determined, provided that the defendant, during the pendency of said appeal, gives a recognizance in the sum of Ten Thousand Dollars ($10,000.00) with security with the approval of the Clerk of Courts conditioned according to law. The defendant is remanded to the custody of the sheriff until such recognizance is given. Counsel for the defendant may have his exceptions.

APPENDIX E.

Journal Entries of the Supreme Court of Ohio.

(Wednesday, September 25, 1963.)

These causes, here on appeal as of right from the Court of Appeals for Geauga County, were heard in the manner prescribed by law, and, no motion to dismiss such appeals having been filed, the Court sua sponte dismisses the appeals for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendants-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

(Duly certified.)

(Sep. 25, 1963.)

It is ordered by the Court that these motions are overruled.

Rehearing.

(Wednesday, October 23, 1963.)

It is ordered by the Court that rehearing in these cases is denied.

APPENDIX F.

Statutes and Constitutional Provisions.

UNITED STATES CONSTITUTION

Amendment [XIV].

[Rights of Citizens].

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE.

§ 2301.20. Court may order full report of testimony. (G C § 1548.)

Upon the trial of a case in the court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved.

APPENDIX G.

Prosecutor's Final Argument.

Begun at 10:41 a.m. Tuesday, June 12, 1962.

Ladies and gentlemen of the jury, I have not had the good fortune to have met you as my partner Mr. Henry had when he conducted the Voir Dire examination, so I will introduce myself to each one of you now.

Let's see, you are juror number one, Grace Scholle. I am Edwin Hofstetter, your Prosecuting Attorney, and I'm glad to meet you.

And you are juror number two, Anne Hollo, and you are Blanche Ritchie, juror number three, and you are Carolyn Trask, number four, I'm glad to meet you, and I'm glad to meet you, you are juror number five, Helen Dunlop; and your name is Anne Pennmoyer, is it not? And you are juror number seven, one of the men of the jury, Herschel Westover, and you are Jeanne West, juror number eight, and Margaret Ball, juror number nine, and Rose Cummings, number ten, and Frank Greene, number eleven, and Dorothy Perry, last but not least. I am glad to meet all of you and thank you for your attention during the trial of this case.

Now I will tell you what the issues are. The State of Ohio has indicted the defendants on the following counts and I believe we have proved them true, beyond a reasonable doubt. They are as follows:

They are the same for each defendant.

COUNT ONE: That the defendants did unlawfully and with malicious intent to maim, assault and strike Robert Gregory with dangerous instruments, thereby breaking the leg of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

The defendants are of course guilty of this count because Gregory's leg was broken and the defendants admit it.

The Second Count we proved in:

COUNT TWO: That the defendants did unlawfully and with malicious intent to disfigure, assault and cut Robert Gregory with dangerous instruments, thereby cutting and slitting the nose, ear and lip of Robert Gregory, contrary to Section 2901.19 of the Revised Code of Ohio.

The Third Count we proved in:

COUNT THREE: That the defendants did maliciously cut Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT FOUR: That the defendants did maliciously cut Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT FIVE: That the defendants did maliciously cut Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT SIX: That the defendants did maliciously stab Robert Gregory with intent to kill him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT SEVEN: That the defendants did maliciously stab Robert Gregory with intent to wound him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT EIGHT: That the defendants did maliciously stab Robert Gregory with intent to maim him, contrary to Section 2901.23 of the Revised Code of Ohio.

COUNT NINE: That the defendants did unlawfully assault Robert Gregory with intent to kill him, contrary to Section 2901.24 of the Revised Code of Ohio.

COUNT TEN: That the defendants did unlawfully assault Robert Gregory with dangerous weapons or instruments or by other means or force likely to produce death or great bodily harm to him.

The defendants plead not guilty to these counts, but you may find them guilty as to each count as to each defendant or any number of counts.

The State had to prove Venue and we did prove it occurred inside Chardon Village limits, County of Geauga and State of Ohio, between the hours of two A. M. and six A. M., Eastern Daylight Time, on September 9, 1961. The State must prove malice, but this, of course, can be determined by the nature of the acts and the State must prove intent, and I think we showed that by the fact there was an assault and battery.

Now, I want to review with you, step by step, what happened.

First, Gregory had worked for Mishnes for eighteen (18) months until he was fired in July, 1961.

Hasenflue: Objection.

The Court: Overruled.

Mr. Mishne took the car belonging to Gregory away from him and this shows Mr. Mishne was already irritated at Gregory. He was just w[illegible]g a chance to get Gregory.

Then, George received the break he had been waiting for. One of his customers was a Fred Pierson and Gregory owed him a large amount of money and Gregory had given Fred Pierson a check. When Pierson gave Gregory two (2) weeks to make it good and he couldn't, George had Gregory arrested on purpose so he could bring him back to Geauga County where he could get him.

Hasenflue: Objection, Your Honor. No such evidence.

The Court: Overruled. He may draw his own inferences from the evidence.

The Prosecutor Continued:

After Gregory was fired by Mishne, he went to work for Howell Brothers and they are a competing vending concern, and he took stops away from Mr. Mishne.

Hasenflue: Objection.

The Court: Overruled.

The Prosecutor: And I think the motive for the beating of Gregory was because he had taken these stops away from him.

Mr. Hasenflue: Objection Your Honor, there is no such evidence and I move it be stricken.

The Court: Overruled, there *was* evidence of this.

Mr. Hasenflue: I move for a mistrial and the withdrawal of a juror.

The Court: There is no record being made of this final argument.

Mr. Hasenflue: I was not aware of this and I certainly want my objections and want a record made.

(Mr. Henry: I want the record to show that counsel for the defendants was aware that the argument would not be taken down. Page 570 of Volume II of Bill of Exceptions.)

(Mr. Hasenflue: Counsel for the defendants denies this for the record, had no notice that this was to be done. Page 570 of Volume II of Bill of Exceptions.)

Court: It was discussed in chambers and the Court at that time said it was not customary and relieved the reporter from taking the argument of counsel.

Mr. Hasenflue: This went into the record?

Court: It was not in the record, it was a discussion at that time.

Mr. Hasenflue: Let the record show that this was out of the presence of the defense counsel.

Court: The discussion was had with the defense counsel sitting at the table with the counsel for the State that the record of the argument will not be taken.

Mr. Hasenflue: Defense Counsel excepts.

(Conference among Court and counsel at the bench.)

Mr. Hasenflue: Let the record show the objection of the defendants to the fact that the record will not be taken.

Court: Let the record also show that counsel was apparently not paying attention to this discussion in chambers, then I think he has no reason for complaint at the present time.

Mr. Hasenflue: Let the record show that we were a half hour into argument or a little less and defense counsel objects to this procedure.

Court: Proceed.

(Page 571 of Volume II of Bi'l of Exceptions.)

(The prosecutor, Edwin Hofstetter continued his unrecorded argument at 11:04 A. M.)

This was all done as a part of the plan of George Mishne. He wanted Gregory arrested and brought back to Geauga County so he told Fred Pierson to bring the charges.

Mr. Hasenflue: Objection. No such evidence.

The Court: Overruled.

Prosecutor Continuing: Mr. Clause testified that he sought advice from the Sheriff's office and told Fred Pierson for George and then when Pierson came up George Mishne advanced the $15 in costs to me as Prosecutor.

So it was through the known efforts of George Mishne that Gregory was arrested and brought back to their county for his purposes.

Mr. Hasenflue: Objection.

The Court: The prosecutor may draw logical conclusions from or inferences from the evidence. Overruled.

The Prosecutor Continued: Deputy Sheriff Ohl said George asked him how much it would cost to bail Gregory out and if he could do it and Sheriff Ohl said it would take $100 and then George said to Ohl forget you saw me.

Later George carried his scheme into effect and bailed Gregory out for $100 though Gregory didn't ask him to do it. It was all George's scheme to get Gregory. Then later George told Jack Clause that Gregory was in jail.

Then two calls were made to Ernie's house from George's house so George could get Ernie with him before he bailed Gregory out.

Mr. Hasenflue: Objection.

The Court: Overruled.

The Prosecutor Continued: Patrolman Niehus okayed George's check to bail him out and he did bail him out, without Gregory's request. And you will remember later in front of the laundromat George Mishne making the threat to Gregory by telling Niehus he was going to break both of Gregory's legs. And at 4:00 A. M., George and Ernie got Robert Gregory and took him down to their warehouse.

Mr. Hasenflue: Objection. He went willingly.

The Court: Overruled this in argument.

The Prosecutor Continued: Once George and Ernie got Gregory in the confined area of the warehouse they beat him up, striking him with this wrecking bar.

Mr. Hasenflue: Objection to Prosecutor holding the exhibit and describing it as the weapon.

The Court: Overruled. The prosecution may argue.

The Prosecution Continued: And he was hit with this stick which was hidden in the trash.

Mr. Hasenflue: Objection. It was in plain sight.

The Court: Overruled.

The Prosecutor Continued: This stick, when the police finally found it, was all covered with blood.

Mr. Hasenflue: Objection.

The Court: Overruled.

The Prosecutor Continued: The stick and the sliver which fits it so perfectly both had the same type of hair as Gregory's.

Mr. Hasenflue: Objection.

The Court: Overruled.

The Prosecutor Continued: There was blood on the mats, on the cardboard, on the stick and on the sliver—all the same type blood as Gregory's.

Mr. Hasenflue: Objection. The blood was not typed.

The Court: The expert testified regarding it and the jury will remember this in argument. Overruled.

The Prosecutor Continued: There was dirt on his clothes and his clothes were wet and the expert testified the dirt was the same as that on the mats. Now you saw Gregory and remember how obviously shaken and moved he was when he described the beating and stabbing and how near to tears he was when describing the threat made that if he didn't say he was hit by a car George would take his wife's life.

Mr. Hasenflue: Which one?

Mr. Henry: Objection. That was uncalled for.

The Court: Yes, the jury will disregard it.

The Prosecutor Continued: You know that Gregory had a broken leg yet Ernie in his statement said he walked in and walked out without help.

Look at these pictures and see if he could walk.

Mr. Hasenflue: Objection.

The Court: Overruled.

The Prosecutor Continued: Gregory only told the policeman at the scene that he was hit by a car and only because of the threats to his life and his wife's life. Later he told Chief of Police exactly what happened.

Mr. Hasenflue: Objection. He first told the Chief at the hospital he was hit by a car.

The Court: The prosecutor didn't say he didn't. All he said was that Gregory in the presence of the Chief of Police told him exactly what happened. Overruled.

The Prosecutor Continued: When Gregory told the Chief of Police he told him of being beaten up. Gregory testified that he knew the reason he got beat up.

Mr. Hasenflue: Objection. No such testimony.

The Court: Yes, he so testified. Overruled.

The Prosecutor Continued: Gregory knew it was because he had taken stops from the Mishnes and for this he had to suffer the injuries you see in these pictures.

Mr. Hasenflue: Objection.

The Court: Overruled.

The Prosecutor Continued: Now when you decide this case the law of reasonable doubt will no doubt be discussed by you and you will have a charge with you.

The Court: Matters of law are for the Court to decide. You may not argue them.

(The Prosecutor then went over and had a conference with Mr. Henry. He then continued his argument.)

One more thing, ladies and gentlemen of the jury—when you get in your jury room you may comment on the fact that the defendants didn't testify in their own defense.

Thank you for your attention.

(The Prosecutor concluded his argument at 12:05 P. M., Tuesday, June 12, 1962.)

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 744.

ERNEST A. MISHNE,
and
GEORGE MISHNE,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition For Writ of Certiorari to the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

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In Opposition to Petition For Writ of Certiorari to the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

STATEMENT OF FACTS.

The Defendants, George Mishne and his son Ernest Mishne, operated a vending machine company out of a combination office-warehouse building in Chardon, Ohio, which used to be a garage. Their vending machines are placed in various commercial and industrial establishments in Geauga, Lake, Ashtabula, and Trumbull Counties. Robert Gregory worked for them for approximately one year and eight months. He quit or was fired in August of 1961.

Before he had left the employ of the Mishnes, Gregory wrote a check for twenty dollars to Hambden Gulf. This check was returned for insufficient funds. Fred Pierson, who worked at Hambden Gulf, received the check. After talking with Defendant George Mishne, and accompanied

by Jack Clause, an associate of George Mishne, Fred Pierson signed an affidavit in the Prosecutor's office charging Gregory with issuing a bad check (R. 456-465). In Geauga County the complaining witness is required to deposit fifteen dollars in County Court to assure the appearance of the witness at the hearing. George Mishne put up the money for this deposit (R. 464).

Gregory was arrested on this charge in Mecca, Ohio, where his wife operated a restaurant, by Trumbull County Sheriff Deputies and handed over to Geauga Deputies at the County line at approximately eleven p.m., September 8, 1961. They arrived at the Geauga County Jail in Chardon about twelve midnight. At approximately four a.m., September 9, 1961, George Mishne bailed Gregory out for one hundred dollars.

Approximately two and one-half hours after Deputy Tom Ohl put Gregory in jail he talked to Defendant George Mishne in Middlefield (R. 446-448). Mishne asked him if Gregory was going to be arrested, and was told that Gregory was in jail. Mishne wanted to know the amount of bail and if he could bail Gregory out. Ohl asked Mishne why he wanted Gregory arrested, and Mishne said that Gregory used to work for him, owed him money, and ruined a few good business stops, and to figure it out for himself, and forget he (Ohl) had ever seen Mishne. Ohl also said that he learned from Jack Clause, Mishne's business associate, that George Mishne wanted Fred Pierson to sign an affidavit charging Gregory with issuing a bad check so that Mishne would have reason to bring Gregory back.

At approximately three a.m. Chardon Village Police Patrolman Bill Niehus received a call from the Geauga County Sheriff's office to stop there. Niehus proceeded there (R. 304) where he found Defendant George Mishne.

who wanted to use Niehus as reference that his one hundred dollar check for Gregory's bond was good. Mishne was not successful in bonding Gregory out at this time. At about three-twenty a.m. Niehus again ran into Mishne at the south end of the Chardon Village Square (R. 306). Mishne called Niehus over to Mishne's truck where he told Niehus that he was going to bond Gregory out, take him down to the warehouse and talk to him about some bad checks. He asked Niehus to take Gregory down, if he would not go with Mishne. Niehus refused. Mishne then said that if Gregory became violent or tried to get away that he would "break the son of a bitch's legs" (R. 306).

The Chardon Telephone Company records show that two calls were made from a phone listed to George Mishne in Chardon to a phone listed to Ernest Mishne in Cleveland, said calls being made at 2:43 a.m. and 2:46 a.m., September 9, 1961 (R. 493). Ernest Mishne arrived in Chardon in time to be present when George Mishne bailed Gregory out of jail at approximately four a.m., September 9, 1961, and took Gregory to the warehouse.

Defendants George and Ernest Mishne took Gregory down to the warehouse, which is approximately one-half mile from the jail on the outskirts of Chardon Village. They arrived at approximately 4:05 a.m. For nearly one hour thereafter George and Ernest Mishne beat and kicked Gregory with a stick, a wrecking bar, with fists and boots, bruising and cutting him on various parts of his body and breaking his leg. When the police arrived they found Gregory soaking wet and badly injured. Defendant George Mishne, after the police arrived, when asked if he had anything to cover Gregory with, said, "Yes," then went into the warehouse and got a blanket (R. 316) and threw it on Gregory in a heap, saying, "That is more than the son of a bitch would do for me." Defendant George

Mishne then tried to ride in the ambulance with Gregory to the hospital (R. 319). Thereafter, the police searched the warehouse and the area in front. Gregory having said that he had been hit by a car, they looked in the area in front of the warehouse on the road, but found no evidence of a hit-and-run, such as broken glass, chrome, mud dropped from the fenders from impact, or blood (R. 319). The evidence is inconclusive as to whether or not there were skid marks on the road in the immediate area. There was blood on the gravel in front of the warehouse where Gregory had been lying when found by the police, but no evidence that Gregory had crawled there from the direction of the road. Defendant Ernest Mishne's statement (Defendant's Ex. OO) states that Gregory walked back into the warehouse after being hit by car (See State's Ex. 18, 19 showing Gregory's broken leg).

In the warehouse the police found evidence of blood spattered (R. 265) on cardboard boxes, evidence of an attempt to wipe the blood off of one box by the use of soap powder, a wooden stick with blood on it and human hair imbedded in it a splinter from the stick with a human hair imbedded in it. They also found that the cement floor and rubber mats were soaked with water. The weather that morning was clear and dry, according to Patrolman Niehus (R. 321) and other witnesses.

Gregory was the only eyewitness who testified as to what occurred in the warehouse and as to how he acquired his injuries. The only other witnesses who could have testified as to what did or did not occur in the warehouse between the hours of four and five a.m. that morning were the Defendants George and Ernest Mishne, both of whom chose not to testify.

Gregory was taken by ambulance to the Geauga Community Hospital, which is approximately seven miles from

the warehouse. There Gregory was interviewed by Chief B hl of the Chardon Police Department. Gregory at first told him that he had been involved in an auto accident, but shortly thereafter, five or six minutes (R. 166), he told Chief Bohl that he had been beaten up by Mr. Mishne and his son Ernie. Chief Bohl was present when Gregory made a statement which was later reduced to writing and signed by Gregory. This statement was substantially the same as given by Gregory during the trial.

Gregory's clothes, the wooden stick and splinter, two rubber mats, pieces of the cardboard boxes with the blood spatters and soap powder, and the human hair were taken personally by the Chardon Police to the Bureau of Criminal Identification in London, Ohio, for scientific analysis. Steve Molnar, lab technician from BCI, testified as to the articles. He identified the blood found as being human blood, but could not give the blood type because the blood had dried. He identified the hair as human hair similar in all respects to the sample hair given to him from Gregory's head. He found that some of the dirt imbedded in Gregory's trousers was similar to the dirt found on the rubber mats. He had examined Gregory's clothes for evidence that Gregory had been hit by a hit-skip, and found no evidence that he had been hit by a hit-skip.

Following trial, on June 12, 1962, the jury found both defendants guilty of assault with intent to maim, not guilty of assault with intent to kill and guilty of lesser degrees of assault and battery. George Mishne was found guilty of Counts 1, 2, 4, 5, 7, 8 and 10, but not guilty of Counts 3, 6, or 9, but only of the lesser offense of assault and battery. Ernest Mishne was found guilty of Counts 1, 2, 4, 5, and 10, but not guilty of Counts 3, 6, 7, 8, or 9, but on each of said counts guilty of lesser offense of assault and battery.

The appellants appealed from the judgment of the Common Pleas Court of Geauga County entered following this jury verdict against them and the denial of a motion for a new trial filed thereafter by the appellants.

The Court of Appeals affirmed the judgment on the verdict of the Court of Common Pleas and denied appellants' motion to certify the record on the ground of conflict.

The Supreme Court of Ohio denied defendants-appellants' motion for leave to appeal.

Defendants-appellants now petition for Writ of Certiorari to the Supreme Court of the United States.

ARGUMENT.

Before taking up the questions presented for review by Petitioners, the respondent will briefly go into the merits of the case.

In this criminal trial which lasted seven trial days the State put on sixteen witnesses, including the injured complaining witness, the investigating police officers, medical experts, and an expert criminal laboratory technician. From these witnesses the State elicited evidence which convinced the jury beyond a reasonable doubt that the Defendants were guilty of some of the charges.

None of the testimony of the State's witnesses was controverted by the defense witnesses. Neither defendant took the stand in his own behalf.

The defense put on six witnesses. Four of these witnesses were court record officials of other counties brought in by the defense to show the complaining witness' prior criminal record in an effort to discredit him. The other two defense witnesses, one of whom was an employee of defense counsel, testified as to skid marks on the roadway in front of the building where the beating occurred.

an attempt to bolster the defense theory that the injuries were caused by a hit-skip motorist.

It appeared from the first day of trial to its end that the theory of the defense was to discredit the complaining witness as much as possible, thoroughly cross-examine each state witness, and take advantage of every possibility of error. The valiant attempt to discredit the State's principal witness, the victim, was not consistent with the defense decision not to put the defendants on the stand.

Petitioners cite *Cuyahoga River Power Co. v. The Northern Realty Co.*, 244 U. S. 300 (1917) as authority that the judgment of the Court of Appeals for Geauga County, Ohio, becomes the final judgment of the highest Court of the State of Ohio. We do not dispute this. However, this case is also important to the respondent, for it also provides:

> "Where grounds are broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense, the Federal Supreme Court will not take jurisdiction of a writ of error to a state court."

We turn now to the questions presented for review by the petitioners.

1. Were petitioners' constitutional rights to due process and equal protection of the law denied by reason of the Trial Court's refusal to order the court reporter in attendance to record the final argument of the prosecutor?

We contend, and the State Appellate Court held, that this error, if prejudicial, was cured by the presentment by defense counsel of a narrative bill of exceptions. The contents of this narrative bill and an affidavit placed in the record by a private investigator who witnessed the

trial (R. 454), employed by defense counsel, were not disputed by the prosecution and were certified by the trial judge as being accurate records of that portion of the trial. In this way the defense preserved its record and the errors complained of.

Petitioners cite *Eskridge v. Washington State Board of Prison Terms and Parole*, 357 U. S. 214 (1957) in which it was found that the denial of a transcript of proceedings to an indigent person is a denial of due process and equal protection. However, in that case the court remarked that "there was nothing in the record to show that any adequate substitute for a court reporter's transcript was available to the appellant." The court also stated in that case that "under some circumstances notes compiled by someone other than the reporter could be an adequate substitute for a court reporter's transcript."

Petitioners also cite *Griffin v. United States of America*, 351 U. S. 12 (1955), which held that there should be no discrimination between indigent and non-indigent persons. But this case too seems rather to bolster respondent's position. In syllabus 10 it is stated:

> "The court does not hold that the state must purchase a transcript in every case where the defendant cannot buy it; there may be other means of affording adequate and effective appellate review, for instance upon a bystanders' bill of exceptions."

Chessman v. Teets, 350 U. S. 3 (1955) and 354 U. S. 156 (1957), also cited by petitioners, is a case involving settlement of a seriously disputed record at a proceedings in which the defendant was not represented either personally or by counsel. The court reporter died before preparing the transcript and the substitute, an uncle of the prosecutor, completed the record after conferring

with only police and prosecutor. This is not pertinent to the instant case in which the record is not disputed.

2. Is the right to a fair trial vitiated when the prosecutor in final argument makes allegations of fact which were not supported by the evidence and which concern important issues in the case?

Petitioners particularly refer to the prosecutor asserting that the motive for the crime was that the victim had taken certain business stops away from the defendants. This assertion was proper and was based on the testimony of Deputy Ohl at page 447 of the record:

> "I asked him (George Mishne, one of petitioners) why he wanted Mr. Gregory arrested, and he stated he used to work for him and had ruined a few good business places and he stated that Mr. Gregory owed him money and ruined a few good business places and to figure it out for myself and to forget I ever seen him that night."

The cases cited by petitioners (*Alcorta v. Texas*, 355 U. S. 28 (1957); *Mooney v. Holohan*, 294 U. S. 103 (1935); *Pyle v. Kansas*, 317 U. S. 213 (1942); *Napu v. Illinois*, 360 U. S. 264 (1958)) all are cases in which the prosecutor obtained convictions upon testimony known by him to be perjured and is not relevant here.

In the case of *Buchalter v. New York*, 319 U. S. 427 (1943) cited by petitioners, the 4th syllabus therein argues against the petitioners. It reads as follows:

> "The making of statements by the District Attorney in the course of a criminal trial do not raise a due process question reviewable in the Supreme Court of the United States."

3. Were petitioners denied a fair and impartial trial by reason of certain comments of the Trial Court tending to indicate to the jury that he favored the prosecution and believed the complaining witness?

The State Appellate Court and the State Supreme Court reviewed the petitioners' claims of error and found them without merit.

The case above referred to, *Buchalter v. New York*, *supra*, cited by petitioners, is again helpful to this respondent. On page 431 in his majority opinion, J. Roberts says:

> "That the due process clause of the 14th Amendment does not enable this Court to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law."

Also syllabus 2 of that same case reads as follows:

> "The 14th Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and criminal law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in the Supreme Court of the United States every ruling made in the course of a trial in a state court."

It is interesting to note that petitioners cited as their authority under this question only criminal cases heard in the Federal Circuit Courts of Appeals which originated in the Federal District Courts. The reason, of course, is that state cases involving this question and question No. 2 herein have been decided by state reviewing courts.

CONCLUSION.

As concluded by the jury and the trial court and in the words of the State Appellate Court, "There is only one reasonable explanation of what transpired on the morning of September 9 as revealed in this record, and that is the conclusion the jury reached that Robert Gregory underwent a brutal beating at the hands of these appellants." Petitioners' failure to testify in their own behalf further confirms this conclusion.

The failure to record the final argument of the prosecutor was not prejudicial to the defense, since defense counsel preserved his claims of error by filing a narrative bill of particulars and affidavits of court room bystanders, who incidentally were employed by said counsel. The facts alleged in the bill and affidavits were not controverted by the prosecution. The right to have a record taken is given by state law and the claimed error in denial of this right was fully reviewed by the state appellate courts.

Statements made by the prosecutor in final argument and comments made by the trial judge do not raise due process questions reviewable in the Supreme Court of the United States. This is the reason counsel for defense was unable to find Supreme Court cases in point on these two questions. For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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